UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

ROSEBURG FOREST PRODUCTS CO.,

and Case 19–CA–213306

CARPENTERS INDUSTRIAL COUNCIL (CIC),
LOCAL UNION NO. 2949

Irene Botero, Esq.
for the General Counsel.
Kyle Abraham, Esq.
for the Respondent.
Katelyn Oldham, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eleanor Laws Administrative Law Judge. This case was tried in Roseburg, Oregon, on August 29, 2018. The Carpenters Industrial Council, Local Union 2949 (the Union, Charging Party, or Local 2949) filed the charge on January 18, 2018, and an amended charge on May 1, 2018. The General Counsel issued the original complaint on May 30, 2018. Roseburg Forest Products (the Respondent or RFP) filed a timely answer denying all material allegations.

The complaint alleges the Respondent suspended and then discharged employee Nicholas Miller for engaging in union and/or protected concerted activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

On the entire record, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Riddle, Oregon (the Riddle Plant), and has been engaged in the manufacture and the nonretail sale of softwood plywood. The parties admit, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Respondent's Operations

The Respondent is a forest products company based in Springfield, Oregon, engaged in the manufacture and marketing of wood products. The Riddle Plant, at issue here, is one of several plants the Respondent operates in the Northwest and Southeast United States. Employees at the Riddle Plant manufacture softwood plywood.

The following unit has been certified for purposes of collective bargaining under Section 9(b) of the Act:

> All of Respondent's production, maintenance and transportation employees and all temporary and part-time employees who perform work within the bargaining unit, excluding office and clerical employees, and guards, supervisors, quality and production control, technical and professional employees as defined in the Act.

The Charging Party and the Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective June 1, 2016, through June 1, 2020. (GC Exh. 2.)[1] Roughly 430–450 bargaining-unit employees work at the Riddle Plant.

The Local 2949 maintains a Facebook page for members to socialize and share workplace issues. It is moderated by a group of its members, including Sue Crawford, Jeannie Weakley (J. Weakley), and Bill Miller. The Facebook page is restricted, with only members who have been approved by the moderators having access.[2]

Nicholas Miller (N. Miller) worked at the Riddle Plant from November 3, 2003, until his termination on September 8, 2017. For the 5 years preceding his termination, N. Miller worked

[1] Abbreviations used in this decision are as follows: "Tr." for transcript;; "GC Exh." for the General Counsel's exhibit; "R Exh." for the Respondent's exhibit ; "GC Br." for the General Counsel's brief, "R Br." for the Respondent's brief, and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record.

[2] Some union officials also have access. RFP supervisors and managers are not eligible for access to the page.

as a detail saw operator in the finish end department.[3] He reported to his uncle, Ken Miller (K. Miller), the supervisor of the finish end department. K. Miller reported to Dan Cornell the finishing superintendent. Cornell reported to Chad Lynch, the panel superintendent. Lynch reported to Tate Muir, the plant superintendent, and Muir reported to Tony Ramm, the Riddle Plant manager.[4] During the relevant time period, Tris Thayer was the human resources (HR) supervisor [5] and Deneen Dahl was the safety manager. [6] (R Exh. 2.)

When Ramm became the Riddle Plant manager in May 2014, he implemented a strategy of developing a workforce with "world class behaviors." This entailed making sure the leadership team treated employees with respect and enhanced their self-esteem through questions rather than yelling and screaming. Once the leadership team was trained, management began setting the same expectations for the crew members. At the end of 2015/beginning of 2016, Ramm and Dahl conducted crew meetings to teach employees that they should communicate respectfully, and avoid foul language and derogatory comments that would tend to damage self-esteem. Edward Weakley (E. Weakley), who has worked for RFP for 50 years, and is a trustee, delegate, and shop steward for the Union, experienced a change of culture at the mill in the last 5–6 years, with management expecting employees, including supervisors, to act in a more professional and appropriate manner.

The Respondent has a non-harassment policy, handed out during orientation, proscribing discriminatory and/or harassing behavior .[7] (R Exh. 3.) As of at least June 16, 2017, the Respondent has maintained social media guidelines. (R Exh. 6.) Since at least June 6, 2017, the Respondent has maintained an open door policy. (R Exh. 7.) The social media policy and open door policy were likely communicated to employees on a slide during a communication meeting.[8]

B. N. Miller's Recent Background

Forrest Bray (Bray), the previous finish end supervisor sent N. Miller home early on May 12, 2016, because he was away from his work station. A May 13, 2016, corrective action discussion states that N. Miller had been suspended for the rest of his shift the previous night for job performance and failure to communicate with his supervisor. N. Miller was provided with a book called "Question Behind the Question" which discusses how to communicate productively. (R Exh. 11.) In a meeting with Dahl, Bray, Cornell, and Thayer about this incident, N. Miller denied fault, and instead stated he believed Bray had been harsh with him, accusing him of shutting down his machine too often. N. Miller called Bray a liar, and said he was lazy and worthless.[9] N.

[3] N. Miller was the more senior of the two detail saw operators at the Riddle plant.

[4] At the time of the hearing, Ramm was the general manager of the plywood plants.

[5] At the time of the hearing, Thayer worked for a different employer.

[6] At the time of the hearing, Dahl was human resources manager.

[7] R Exh. 3 is the version of the non-harassment policy dated May 2017, which post-dates N. Miller's start date by more than a decade. Dahl did not know whether N. Miller received a copy or whether any employee had signed off as receiving this policy prior to September 2017.

[8] Dahl testified that typically policies are communicated on slides, depending on whether or not they have signoff pages. Neither R Exhs. 6 nor 7 has a signoff page for employees. R Exh. 7 has a signature line for the Vice President of Human Resources only.

[9] Dahl was not on the original meeting invite, but was later invited to the meeting when it became apparent N. Miller's certified buddy status would be taken away.

Miller lost his status as a "certified buddy," which was an enhanced role that involved supervising a more junior employee in locking out correctly. N. Miller's "certified buddy" status was taken away because he had signed off as a certified buddy for the newer employee even though the lockout tagout had not been done properly. During a step-1 grievance meeting, N. Miller was told that his attitude and performance needed to improve for him to continue to work for the Respondent. [10]

N. Miller received a performance assessment on December 11, 2016. The "needs improvement" box was checked more frequently than in previous performance assessments, and in the "comments" section, the loss of his certified buddy status was noted, as was the need to improve overall on teamwork. (R Exh. 15.)

Every quarter, Ramm closes down the mill in sections to meet with employees. In the meetings, he discusses RFP's performance, including where they are doing well, and what they are looking toward. He also gets feedback from the crew. During such a meeting in the summer of 2017, N. Miller stated that because RFP had terminated supervisors for performance reasons, but had kept two supervisors who had violated safety protocols, it portrayed the image that safety was no longer a priority. Ramm said that was N. Miller's opinion, and N. Miller responded that he had talked to coworkers who felt the same way. Ramm knew that one of the supervisors who had been terminated was N. Miller's father, and that N. Miller believed Bray should have been terminated for safety issues. Ramm told N. Miller that the employee meeting was an inappropriate place for him to ask about someone else's performance. After the meeting, Ramm took N. Miller to his office and they had a closed-door discussion. Ramm explained to N. Miller that he was unable to share personnel files with him, but the matter had been fully investigated and the Respondent had acted pursuant to the investigation. The meeting ended positively, and N. Miller was not disciplined.

C. Employee Reactions to Smoky Working Conditions

In late August and early September 2017, forest fires caused smoky conditions in the Riddle area. Management struggled to keep smoke out of the Riddle Plant, as it is not a sealed facility. Employees complained, and management recognized the air quality at the mill was not ideal. In response, management offered dust masks and permitted employees to use paid time off work or unpaid leave if they felt the conditions at the mill were unsafe. On three occasions, the mill was closed down because the air quality impeded visibility creating an unsafe work environment. Based on the wind patterns impacting when smoke would enter the mill, management decided to close the doors and windows in the evening, when the smoke was more cleared out, until the next morning. The plant, which is not air-conditioned, gets hot in the summer, and the temperature inside is cooler when the plant doors can remain open. The windows and doors have therefore typically remained open when it is hot.

[10] Clearly, N. Miller did not get along with Bray. On the "Feedback to Supervisor" portion of his December 2016 performance appraisal, N. Miller stated Bray had poor communication skills, was unproductive toward employees when stressed, put production before safety, was a compulsive liar, and an overall bad supervisor. (R Exh. 15.)

When employees came to work the morning of September 5, the doors and windows to the plant had been closed.[11] N. Miller expressed to his coworkers his belief that it was not possible to restrict the amount of smoke coming into the plant because it is not a sealed facility and it lacks an air filtration system. At around 7:00 a.m. N. Miller asked K. Miller why the doors and windows had been closed. K. Miller said management had decided to close the windows to restrict the smoke coming into the plant. N. Miller reiterated the beliefs he expressed to his coworkers, said he thought closing the doors and windows was a dumb idea, and complained that the plant would become hotter, creating another safety concern.

Around 7:30 a.m., N. Miller posted the following on the Union's Facebook page:

> Apparently closing all of the doors and windows will help keep the smoke out of the plant. Even though the plant isn't sealed and there isn't a filtration system. This is the level of stupidity that our management team has elevated to

(GC Exh. 4.) Eighteen employee-members reacted by hitting either "liking" the post, or hitting a smiley or surprised emoji. Another member responded, "Yeah, close all the windows and doors, but forget about all the holes and cracks in the walls."[12] N. Miller replied, "My point exactly." Becky Smith (Smith) posted in response, "That was done sunday (sic) and it lasted til 11. Smoke found its way in the air and wasn't moving so around noon30 they called it. What's it look like outside over there? It was a blanket that day." A couple of other employees chimed in about the conditions of the plant the preceding weekend and management's decision to close the plant for part of the weekend.

N. Miller then posted, "There's no way to keep the smoke out because it's already in there. There are huge fans sucking in air from outside and closing the doors won't help. It will only turn it into a sweat shop." Two other members "liked" this post. J. Weakley posted that management was handing out masks, and Dwight Williams responded, asking if they were handing out the right ones. N. Miller posted that masks were available but had not been handed out. Todd Fugate replied, "Musta learnt that shit in college." Connie Corleone added, "Safety even said themselves in an email that the masks provided do little to nothing to protect your lungs."

Jerika Sheets posted a report showing the air quality index in Riddle for September 5 at 11:00 a.m. was "very unhealthy." Smith responded, "What the F?!" She also posted that if employees felt they needed to leave it was allowed as an unpaid plant closure. Some other members posted comments about and pictures of the air quality in the plant. The entire exchange among members generated by N. Miller's post occurred on September 5.

Dahl or another manager conducted multiple so-called "glass wall" meetings with the employees about the air quality and visibility in the Riddle Plant. Around 11:00 a.m. on September 5, Dahl, accompanied by Lynch, conducted a meeting with the finish-end employees in the lunchroom. Dahl said she understood there were concerns about the smoke and how

[11] On September 5, the high temperature at the regional weather station in Roseburg, Oregon, was 92, the low temperature was 65, with an average daily temperature of 79 degrees. (Tr. 271.)

[12] N. Miller believed this member was Brittany Cross, an employee at different facility, and the daughter of one of N. Miller's coworkers.

management was trying to deal with it by shutting the windows and the doors. N. Miller expressed his belief that it was silly and/or stupid to believe that shutting the doors and windows would keep smoke out of the mill.[13] Dahl agreed this was not alleviating the problem, and expressed that she was out of ideas, and asked the employees for their ideas. None of the employees offered ideas or otherwise spoke.

D. N. Miller's Suspension and Termination

An employee took a screenshot of N. Miller's September 5 Facebook post and sent it to Dahl at 11:04 a.m. on September 6. (R Exh. 4.) Around that same time, Thayer and Dahl decided to meet with N. Miller. K. Miller instructed N. Miller to accompany him to Thayer's office. Thayer called E. Weakley to represent N. Miller during the meeting and told him it concerned N. Miller's Facebook post.[14] Present for management were Dahl, Thayer, K. Miller, Lynch, and Dathen Walker, a safety technician.[15]

The meeting started out with Dahl asking N. Miller about his Facebook comments.[16] Dahl testified as follows:

> Q How did the meeting start?
>
> A I started the meeting and I said, Nick, you know I met with you yesterday. Went through our conversation, around, hey, here's what we're doing, here's why we're doing it and here's what we're trying to accomplish with closing the doors and closing the windows. I said, I feel like we had a very positive outcome. Nick, you and I are in agreement, it's not a great plan, I understand that. And I said, you know, do you remember yesterday when I asked you, you know, hey, if you have any solutions or suggestions, please come see me, he said, yes. And then I asked Eddie Weakley, you know, do you remember me having that conversation with Nick, and he said, I do.[17] And I said, Nick, I've been made aware that you had posted on Facebook about, you know,

[13] N. Miller said he did not speak during the meeting, but I credit Dahl on this point. N. Miller admittedly was not paying much attention as he was eating his lunch. By contrast, Dahl's recollection of N. Miller saying it was silly to think closing the doors and windows would keep out the smoke was unequivocal and certain. (Tr. 108.)

[14] E. Weakley's testimony that Thayer called him to the meeting to discuss the Facebook comment is uncontradicted and is supported by his contemporaneous notes. (GC Exh. 6.) Thayer testified the meeting was held because of reports of derogatory comments from N. Miller's coworkers and the Facebook post.

[15] None of the witnesses who were in the meeting had clear recall of precisely who was there. Dahl listed the employees she recalled had been present, but then qualified it by saying, "To the best of my recollection." (Tr. 139.) Thayer listed those who were present, prefaced by "Best of my recollection . . ." and said he thought he was missing one person in addition to those he listed. (Tr. 195.) N. Miller listed who was present, but could not remember one individual's name, and thought there was also an additional person present. (Tr. 74–75.) N. Miller also thought Kevin Craig, the superintendent over drying, was there, and E. Weakley thought Craig may have been present but was not sure. (Tr. 26.) E. Weakley recalled another employee, Alice Briggs, was also present, but the weight of the evidence indicates she was not.

[16] Dahl's testimony and E.Weakley's notes both indicate that the meeting started this way.

[17] Dahl thought N. Miller's Facebook posting occurred after the September 5 meeting with the finish end employees rather than earlier that morning

> managements stupid and, you know, you think it's a terrible idea, you know, do you have other concerns, you know, I'm confused where this post came from. We just talked about this. So –
>
> Q And how did he respond?
>
> A He started to get frustrated, said, I could post whatever I want.
>
> I said, I agree. It's not -- I don't care about the post. I'm trying to resolve your issue, which seems like it's the same issue we had yesterday when we kind of understood I don't know what else to do. We're kind of stuck here. And I said, you know, to say that I'm stupid after you didn't have any other solution either, and he said, you know, Deneen, I don't think you're stupid and I don't think Chad Lynch is stupid. He didn't call him Chad Lynch, he said Chad. But he said the rest of the management team is a bunch of idiots.

(Tr. 140–141.) After going back and forth, N. Miller said they weren't getting anywhere, and held up his arms. Dahl agreed they were not making any headway. Dahl left the meeting briefly and went to her office across the hall .[18] During the exchange, voices were raised, but nobody used profanity or threatening language, and nobody left their seats.[19] At Thayer's request, N. Miller and E. Weakley left the room for about 10 minutes while management, including Dahl who had returned to the meeting, caucused.[20] When they reconvened, Thayer told N. Miller he was suspended pending investigation.

On September 8, Thayer called N. Miller and told him he had been terminated. Ramm is vested with the authority to terminate employees. In making his recommendation to Ramm to terminate N. Miller, Thayer primarily relied on what had transpired at the September 6 meeting, but also relied in part on N. Miller's attendance, performance, and the comment he made in the crew meeting. Ramm made the decision to terminate N. Miller based on Thayer's input. Ramm also spoke with Dahl, Muir, Lynch, and K. Miller. In addition, Ramm considered the comment N. Miller had made about management keeping the bad supervisors and letting go of the good ones. Ramm looked at N. Miller's performance reviews as well as his past discipline and determined that N. Miller had a pattern of difficulty following instructions and treating people respectfully.

[18] Dahl and Thayer conveyed that N. Miller became louder and more frustrated during the meeting. N. Miller and E. Weakley testified that Dahl and N. Miller both spoke with elevated voices. It is clear to me the exchange was somewhat heated, but that no party lost control or approached the level of becoming violent.

[19] Dahl testified that N. Miller's face was red, and he was tilted back in his chair with his arms folded. Dahl and Thayer testified that they were unable to calm N. Miller down during the meeting. N. Miller and E. Weakley dispute that N. Miller was ever out of control. Considering the testimony of all who were present, and as detailed in the analysis below, both N. Miller and Dahl were upset, and acted within the bounds of normal behavior in what commenced as a contentious setting.

[20] Dahl testified that N. Miller expressed frustration that RFP never listened to his ideas. I do not find the issue of whether N. Miller in fact made such comments material to the outcome of this case, as discussed below.

Pursuant to the Respondent's termination records, the reason for N. Miller's termination was "Violation of Company Loyalty." (GC Exh. 5; R Exh. 16.) Thayer completed and signed the employee termination record, and checked the box indicating that N. Miller had violated company loyalty because that best represented the reason for his termination.[21] Thayer did not check boxes on the form indicating performance, absenteeism or tardiness, failure to follow work instructions, communication issues, or violation of company policy as a reason for N. Miller's termination.

E. Other Employees' Social Media Posts and Workplace Comments

Around September 6, Dahl told Smith the language she used in connection with N. Miller's post did not represent her very well. In addition to the comments detailed above, Smith posted at 7:37 a.m. on September 5, as part of the screenshot sent to Dahl:

> This won't last long…. I have been on the receiving (sic) end of my employers displeasure not once, but twice due to posts on this site. I sure hope you feel you look better. There will not be a 3rd time. Soon as i hit post, I'm removing myself. They never said who you are, i didn't ask, i don't care. You know who you are...GO FUCK YOURSELF!

(R Exh. 4.) Dahl spoke with Smith, who agreed the post did not reflect well on her. The conversation was positive and ended with the two hugging.[22]

Back in June 2015, employee Scott McCool posted the following to a group called "Umpqua Chatters":

> Thank you Roseburg for the big glass of suck you poured that we all get to quaff from.
>
> The hard hats are wonderful in 90-100 degree temperatures, and the big suck ass glasses over our own glasses just can't be beat for comfort.
>
> Hats off to you in your air conditioned offices who made these choices.

(R Exh. 5.) Ramm spoke to McCool about the post.[23]

On November 15, 2016, employee Jay Milburn posted on his Facebook page the following: "Thank you everyone for all the birthday wishes. i really appreciated them, even if I had to work. Couldn't call in sick, didn't seem right. .....this time anyway." (R Exh. 8.) Dahl saw this post because she and Milburn are Facebook friends. She responded on Facebook, Happy late birthday Jay Milburn, glad you got to spend the day with us! Your smile makes everyone's day!", followed by a smiley emoji. Milburn was not disciplined for his post.

[21] The Union filed a grievance over N. Miller's termination.

[22] Dahl initially testified that Smith had apologized, but later testified she was not sure she had apologized but had agreed it reflected poorly on her.

[23] Dahl did not know the nature of the conversation Ramm had with McCool, and Ramm did not provide testimony on the topic.

In March of 2017, employee Linda Wright showed Dahl a Facebook post from Smith about her supervisor, Forrest Bray, asking to do something she found unsafe. Smith had already reported the incident to Dahl. Dahl spoke with Smith in the HR office and let her know the incident was being investigated. Smith was not disciplined, and Bray was suspended for a week. A later video determined that Smith and her coworker Rusty had lied and were doing the exact same thing for which they had accused Bray. Neither Smith nor Rusty were disciplined because management determined Bray should have stopped them.

On September 3, 2017, Wright showed Dahl another Facebook post Smith made about the poor air quality in the plant, accompanied by a picture of the smoky conditions inside the plant. (R Exh. 9.) Muir spoke to Smith about posting this and another picture of the plant, because posting pictures from inside the mill is only allowed with prior permission. Smith was disciplined for taking a picture from outside the facility because she did not clock out when she left the facility.

Employee R.C. Jenkins posted a picture of the smoky conditions inside the facility on his personal Facebook page. (R Exh. 10.) Dahl talked to Jenkins, who apologized and removed the photo. He was not disciplined.

Employee Mike Axtel made derogatory comments about RFP, supervisors, and new hires. Ramm spoke to Axtel about his comments but did not discipline him.

Ramm suspended Nick Parker, a front-line supervisor, for making a harsh sarcastic comment to an employee. The employee had raised concerns about hitting his head on a bolt hanging down from a beltway, and the supervisor responded, "Well, duck next time."

III. Decision and Analysis

A. Credibility

Evaluation of the issues in this case requires assessment of witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp*., 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse

inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).

It is impossible to reconcile all of the different recollections of the witnesses for both sides. In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g. *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. My credibility findings are incorporated into my legal analysis below on certain relevant topics. In line with *Universal Camera Corp.*, I do not in blanket fashion fully credit or discredit the various witnesses who testified on the most material matter before me—i.e. what precisely occurred at the September 6 meeting, as specified below.

B. Discipline Arising out of Protected Activity Analysis

Most cases involving alleged discriminatory discipline are analyzed under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). The Board has held, however, that *Wright Line* does not apply to situations where a causal connection between the employee's protected activity and the employer's conduct that is alleged to be unlawful may be presumed. See e.g., *Aluminum Co. of America*, 338 NLRB 20, 22 (2002); *Atlantic Scaffolding Co.*, 356 NLRB 835, 839 (2011). An employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity*." Burnup & Sims, Inc*., 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the *res gestae* of his protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, supra.

An employee's leeway for impulsive behavior when engaging in protected activity is not without limit and is subject to the employer's right to maintain order and respect in the workplace. *See Piper Realty Co*., 313 NLRB 1289, 1290 (1994); *NLRB v. Ben Pekin Co*., 452 F.2d 205, 207 (7th Cir. 1991); *NLRB v. Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965). The standard for determining whether specified conduct is removed from the protections of the Act is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–05 (2007), quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946); See also *Hawthorne Mazda*, 251 NLRB 313, 316 (1980), and cases cited therein; *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991); *Aroostook County Regional Ophthalmology Center* 317 NLRB 218,

220 (1995), enf. denied in part 81 F.3d 209 (D. C. Cir. 1996); *Health Care & Retirement Corp.*, 306 NLRB 66, 65 (1992) (Foul language or epithets directed to a member of management insufficient to require forfeiting employees protection under Section 7).

Application of the above framework depends on whether it is appropriate to assume a causal relationship between N. Miller's protected activity and the discipline he received. The questions that arise, then, are first whether N. Miller's Facebook post and ensuing conduct were protected and remained so, and second whether this activity may be presumed as the reason for the alleged unlawful discipline.

N. Miller clearly engaged in protected activity by complaining about the smoke in the Riddle Plant and management's response to it. He complained orally to employees and supervisors, and on the Union's Facebook page, about the smoky conditions, exacerbated by the hot environment closing the doors and windows created. Undeniably, his concerns were shared by other employee Union members, as the Facebook string, including employees' reactions to N. Miller's posts, shows. See *Meyers Industries (Meyers I)*, 268 NLRB 493 (21984), reversed sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). N. Miller's individual complaint to his supervisor and his affirmation of his Facebook post to the supervisors and managers at the September meeting were "logical outgrowth[s] of the concerns of the group" and were thus concerted.[24] *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 3 10 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). I find, therefore, N. Miller engaged in protected concerted activity and Union activity.[25]

As to whether N. Miller lost the Act's protections by virtue of his behavior, I find he squarely did not.

With regard to activity on social media, including Facebook posts, the Board evaluates whether they were sufficiently disloyal, reckless, or maliciously untrue as to lose the Act's protection. *Jefferson Standard*, 346 US 464 (1953); *Linn v. Plant Guards Local 114*, 383 US 53 (1966); *Triple Play Sports Bar*, 361 NLRB 308 (2014).[26] In *Triple Play Sports Bar*, employees of a bar were part of a Facebook discussion lamenting the taxes they owed because of the owner's errors. Most parallel to the situation here, employee Sanzone chimed in, "I owe too, such an asshole." and was terminated for disloyalty. The Board found the employer violated the Act, as Sanzone's reference on another employee's Facebook page to the bar's owner as an

[24] N. Miller's action of raising the complaint with management distinguishes the Facebook conversation from the unprotected activity of "mere griping" unaccompanied by action or contemplation thereof. (See cases cited in R Br. pp. 30–31.)

[25] In addition to raising his complaints on the Union Facebook page, N. Miller's complaint falls within the definition of union activity because the collective-bargaining agreement between the Union and the Respondent contains a safety clause. *Wheeling-Pittsburgh Steel Corp.*, 277 NLRB 1388, enfd. 821 F.2d 342 (6th Cir. 1987).

[26] The legal paradigm for determining whether social media posts lose protection is different than the legal paradigm for workplace interactions. This case presents both, though they are inextricably intertwined. I have utilized both paradigms, but in cases where the protected communications take multiple forms, consideration of the totality of the circumstances makes the most sense.

"asshole" was not sufficiently egregious to warrant her termination. The first factor the Board considered was that the Facebook discussion was about an ongoing dispute over the employer's tax-withholding practices. Here, the discussion was about an ongoing dispute over management's response to the smoky work environment. Second, the Board noted that the Sanzone's comment was not directed to the general public, but was made on an individual's personal page "rather than, for example, a company page providing information about its products or services." Id. at 312. The same is true here, as the comment was made on a Facebook page not open to the public or even the Respondent's supervisors and managers. Significantly, the Board in *Triple Play* stated:

> Where, as here, the purpose of employee communications is to seek and provide mutual support looking toward group action to encourage the employer to address problems in terms or conditions of employment, not to disparage its product or services or undermine its reputation, the communications are protected. *See Valley Hospital*, 351 NLRB at 1252 fn. 7, and cases cited therein.

Id. N. Miller's comment that unnamed management exercised stupidity by closing the Riddle Plant's doors and windows was made on a closed Facebook page intended for union members. It was milder in nature and less pointed in its target than the comment the Board found protected in *Triple Play*.

In *Pier Sixty*, 362 NLRB 505 (2015), the Board approved the judge's consideration of multiple factors when considering whether a Facebook post violated the Act. Applicable here, and not addressed elsewhere in this decision, are the related factors of whether the Respondent considered language similar to that used by the employee to be offensive, and whether the Respondent maintained a specific rule prohibiting the language at issue.[27] I agree with the Respondent that the evidence establishes a culture at RFP that did not tolerate employees demeaning or insulting each other. N. Miller's Facebook statement that managers were acting stupidly was more frowned upon at RFP than it would likely have been at most other industrial plants.[28] This weighs against protection.

Regarding whether the Respondent maintained a specific rule or policy prohibiting the language at issue, the Respondent points to its non-harassment and open door policies.[29] The non-harassment policy states that RFP will "not tolerate behavior that is inappropriate" and "[e]ach and every employee is expected to conduct themselves in an appropriate, professional manner." (R Exh. 3.) While this policy could arguably be read to prohibit N. Miller from

[27] The other factors are substantively addressed in other sections, as their analyses are relevant to considerations in other legal frameworks, and not unique to the context of a Facebook post in a closed group. The location, subject matter and nature of the Facebook post are considered in the *Triple Play* analysis. The other factors, *i.e.* whether the record contained any evidence of the Respondent's antiunion hostility; whether the Respondent provoked Miller's conduct; whether Miller's conduct was impulsive or deliberate; and whether the discipline imposed upon Perez was typical of that imposed for similar violations or disproportionate to his offense, are considered as part of the totality of the circumstances.

[28] His statements in the meeting do not fall into this paradigm.

[29] The Respondent also points to RFP's core values: Sawdust in the Veins, Handshake Integrity, Driven to Win. These clearly do not, at least explicitly, prohibit the language in N. Miller's Facebook post. The Respondent does not assert that the language in N. Miller's Facebook post specifically violated its social media policy.

commenting on Facebook that management had made a stupid decision in closing the doors and windows, the context of a closed Union-based forum must be considered.[30] In a forum where it is abundantly clear the employees vent their frustrations to each other, N. Miller's relatively tame comment is not out of place at all.

The Respondent's open door policy states in relevant part, "it is important that you have a way to address work-related issues. We strongly believe that by working together, we can resolve almost any question or concern that may arise. If you have a problem or concern, we want you to tell us." (R Exh. 7.) This policy does not address N. Miller's situation, as he both made the Facebook post and shared his complaint with management. This factor therefore weighs in favor of protection.

Considering the totality of the circumstances, I find that N. Miller's Facebook post was at all times protected.

Turning to N. Miller's behavior at the meeting, I will first address the relationship between: (a) the Facebook post and the related verbal complaints about management's response to the smoke at the facility; and (b) the affirmation of these complaints at the September 6 meeting. I find the September 6 meeting was part of the course of N. Miller's protected activity. It is undisputed that the meeting was called contemporaneously with Dahl receiving the screenshot of the Facebook post. Thayer told Union Steward E. Weakley he wanted him at the meeting because of N. Miller's Facebook post. The meeting commenced with N. Miller being asked about the Facebook post. It was obviously convened to address N. Miller's Facebook post. For the Respondent to say that it was simply a meeting to gather information about N. Miller's concerns about the smoke in the facility and was somehow attenuated from his Facebook post and his related complaint to his supervisor defies reason.[31]

Regarding what N. Miller said, I credit the testimony of Dahl and Thayer that N. Miller referred to unnamed management, with the exception of a couple specified managers, as "dumb", "stupid", "idiots" or like terms during the September 6 meeting. Dahl's testimony on this point, detailed above, was very specific and convincing, and was corroborated. N. Miller and E. Weakley's blanket denials were less persuasive, particularly in light of the fact that N. Miller quite clearly referred to management as acting stupidly in his Facebook post, and expressed his belief to K. Miller that it was a dumb idea to close the doors and windows.[32]

Because the meeting in which N. Miller's alleged unprotected conduct occurred in person at the workplace, the factors set forth in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979), apply. Under *Atlantic Steel,* the Board considers the following factors to determine whether an employee loses the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

[30] I note the *Pier Sixty* factors are for social media posts, not in person meetings, which are still governed by *Atlantic Steel Co*., infra.

[31] In this regard, I find management's act of calling E. Weakley to the meeting at its outset telling.

[32] There is no dispute that N. Miller stood by his Facebook comments during the meeting.

Here, the place of the discussion was a closed-door meeting in the human resources office with several managers, including the top human resources official at the Riddle Plant, where management had summoned the union steward. This weighs in the General Counsel's favor. See, e.g., *Stanford Hotel*, supra (Discussion occurring in private location away from the normal work area and other employees, causing no disruption to order or discipline in the workplace, weighs in favor of protection).

Second, the subject matter of the discussion was the Facebook post, the subject matter of which, in turn, concerned complaints related to working conditions at the Riddle Plant. Because the subject matter of the meeting was N. Miller's concerted protected/union activity, the second factor strongly militates in favor of finding that N. Miller's remarks retained Act's protection. See *Fresenius USA Manufacturing,* 358 NLRB 1261, 1266 (2012). The Respondent argues that N. Miller proceeded to go on a "rant" about how management never listens to his ideas and he would be better off working somewhere else. This does not change the fact, however, that the meeting was called to discuss N. Miller's Facebook post, and the evidence shows that the Facebook post, including the working conditions it addressed, was the crux of the meeting. Moreover, Dahl's testimony demonstrates that N. Miller's comments were initially made in response to being confronted about his Facebook page. I do not find it significant that N. Miller, who by all accounts had become frustrated after being confronted with the private Facebook post someone had surreptitiously shared with management, may have reiterated his comments as the conversation strayed to his other workplace frustrations. It does not negate that the meeting was called to address, and did in fact address, the Facebook post and N. Miller's expressions of dismay over management's decision to deal with the smoke at the facility by closing the doors and windows, resulting in elevated temperatures. See *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286 (9th Cir. 2011).

Turning to the third factor, the nature of the outburst, N. Miller reiterated the comments on his Facebook post which called management, with two exceptions, stupid. While his voice may have been elevated, he did not leave his seat or make any threats. N. Miller referring to management as "stupid" is certainly not something to be condoned. It was, however, a relatively mild expression made out of frustration, devoid of profanity, vulgar or obscene language. The Respondent asserts that N. Miller had to be told to calm down a few times. By any account, however, N. Miller was acting within the bounds of reason in the context of having been called to a meeting with multiple managers and a union steward and confronted with his Facebook post. At most, he raised his voice, interrupted Dahl, sat tilted back with his arms folded, and held up his arms in exasperation when he and Dahl reached an impasse.[33] *Postal Service*, 250 NLRB 4, 6 (1980) (calling acting manager a "stupid ass" in a grievance meeting was part of the *res gestae* of the protected discussion); *Mini-Togs, Inc.*, 304 NLRB 644 (1991)(applying *Postal Service* beyond the grievance setting); *Burle Industries*, 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3d Cir. 1991) (Employee did not forfeit protection when, in the course of encouraging employees to leave the facility due to a possible chemical spill, he called a supervisor a "f'ing asshole" for wanting employees to work despite the fumes). The relatively mild nature of N. Miller's generalized comments weighs in favor of continued protection.

[33] The tendency of people to naturally interrupt is readily apparent from this and any other transcript of litigation.

Finally, I must consider whether N. Miller's comments were, in any way, provoked by an unfair labor practice. While no unfair labor practice had yet occurred, N. Miller's comments were contemporaneous with and provoked by being confronted by numerous managers about his protected concerted/union activity. *Plaza Auto Center,* supra. Accordingly, considering the *Atlantic Steel* factors and the totality of the circumstances, I find that N. Miller's remarks retained the Act's protection.

Based on the foregoing, because preponderant evidence establishes that N. Miller was terminated for conduct that was part of the *res gestae* of his protected concerted and union activities, I find the General Counsel has met her burden to prove a violation of Section 8(a)(3) and (1) as alleged.

C. Mixed-Motives Analysis

Though I do not find *Wright Line* applies to the instant case because the discipline directly resulted from N. Miller's protected activity, I will do an alternative *Wright Line* analysis in the event a reviewing authority disagrees with me. *Wright Line* governs mixed-motive cases where discriminatory intent is alleged. Under *Wright Line*, the General Counsel must initially prove an employee's Section 7 activity was a motivating factor in the employer's adverse employment action against the employee. The elements required to support the General Counsel's initial showing are the employee's union or other protected concerted activity, employer knowledge of that activity, and employer animus. If this is accomplished, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB at 1089.

Unlawful employer motivation may be established by circumstantial evidence, including, among other things: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices; (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc*., 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc*., 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc*., 328 NLRB 1107 (1999)(statements showing animus); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999)(disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment). Another indicator of unlawful motivation is shifting explanations for a personnel action. See *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

N. Miller's protected concerted activity and union activity is established, as discussed above. With regard to employer knowledge, the Respondent asserts that Ramm, the ultimate

decisionmaker, did not know about the Facebook post. It is well established, however, that "the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation." *G4S Secure Solutions*, 364 NLRB No. 92 (2016); See also, *Dobbs International Services*, 335 NLRB 972, 973 (2001); *Vision of Elk River, Inc*. 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference in 361 NLRB 1395 (2014). It is undisputed all the managers and supervisors in the September 6 meeting knew about N. Miller's protected activity. Thayer checked the box indicating the reason for the termination, and signed it as the supervisor. It is abundantly clear that even if Ramm was the actual decisionmaker, he acted on the information that was fed to him about the meeting. He was not at the Riddle Plant on September 6, but somehow was able to testify that the meeting "was not a disciplinary discussion at all. It was really a discussion to troubleshoot." (Tr. 247.) Ramm knew at the very least that the meeting was to address N. Miller's comments concerning management's response to the smoky plant. The evidence is insufficient to establish an affirmative basis for declining to impute knowledge.

Turning to animus, the Board has held that where, as here, adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised. *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003); Kag-West, LLC, 362 NLRB 981 (2015). Here, Dahl received the snapshot of the Facebook post, and she and Thayer immediately convened a meeting with N. Miller and multiple supervisors and managers, and involved a union steward. The timing could not be more telling.

In addition, the record reflects that the Respondent took umbrage at the content of N. Miller's Facebook post, not just his tone and behavior at the September 6 meeting. Dahl's testimony clearly shows that she was upset about the content of the Facebook post, despite assertions to the contrary.

In addition, Ramm's reaction to N. Miller's comment expressing concern about RFP retaining supervisors who don't value safety in the 2017 employee meeting is evidence of animus toward employees raising concerted workplace concerns. I credit N. Miller's testimony that he said he and other employees shared the concern that safety was no longer a priority. His recollection was specific and clear. Ramm, by contrast, did not recall whether or not N. Miller was speaking just for himself or also on behalf of coworkers. Moreover, this concern had been raised by Smith, who posted on Facebook and spoke to Dahl about Bray's unsafe practices in March 2017. Of course Ramm was not obligated to engage N. Miller in a conversation about the reasons some supervisors were retained and others were not, as these are personnel matters employees cannot be privy to. His characterization of N. Miller's comment as "inappropriate" in the group setting, however, sent the message to employees that raising concerns about RFP's actions concerning its supervisors' safety practices was prohibited.[34]

The Respondent's disparate treatment of employee Mike Axtel, who made derogatory comments about the company, supervisors, and new employees but received no discipline also points to animus.

[34] This is not a strong indicator of animus, as Ramm had good reason to believe N. Miller had an axe to grind about his father's termination. Nonetheless, in the context of an employee meeting, N. Miller's comment should not have been called out as inappropriate.

The inconsistencies in the explanations for N. Miller's termination likewise are evidence of unlawful motivation. N. Miller's termination record states it was for "Violation of Company Loyalty", which fits well if he was terminated for the protected activity of complaining about management's response to the smoke situation at the plant. It does not fit well if he was fired for the myriad of reasons the employer offered at the hearing, discussed below.

Because the General Counsel has established a prima facie case, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra, at 1089. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, or that it *could* have taken the action, but must persuade by a preponderance of the evidence that the action *would* have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989); *Structural Composites Industries*, 304 NLRB 729, 730 (1991).

The Respondent contends that N. Miller was terminated for a pattern of behavior, attendance, and performance problems, indicating a pattern of difficulty following instructions and treating people respectfully.

To buttress this claim, the Respondent points to other employees who posted on social media but were not disciplined or were disciplined less harshly. It is not clear whether the "Umpqua Chatters" platform where employee McCool made his comments was public or private. It is also not a matter of record what Ramm said when he met with McCool to discuss the post.[35] As such, I do not find his situation was sufficiently similar to N. Miller's to warrant meaningful comparison. Employee Milburn simply commented that he couldn't call in sick on his birthday, implying he had contemplated it. This is not comparable to N. Miller's post in any way.

In addition, the evidence shows that management confronted employee Becky Smith about the September 5 Facebook posts she made on the Union's Facebook page which complained about being on the receiving end of her employer's displeasure for her previous posts on that site. Although Smith was not disciplined for her comments, she, unlike N. Miller, expressed contrition when confronted by Dahl. Smith's March 2017 post about Bray asking her to do something unsafe had already been reported to Dahl and ended up resulting in discipline for Bray. Apparently, management viewed Smith's complaint as legitimate, which was not the case here. Smith was disciplined for a Facebook post of a picture of the facility she took from the parking lot without clocking out. This is again not comparable to N. Miller's conduct.

Importantly, it wasn't just N. Miller's Facebook post that was protected. It was his complaints to coworkers and his supervisor specifically about management's decision to close the doors and windows, resulting in what N. Miller believed to be an unsafe working condition

[35] The General Counsel requests an adverse inference based on the Respondent's failure to question Ramm about his response to McCool's post, but did not propose an inference. Because I do not find McCool's situation to be analogous, and there is no information whatsoever about the forum "Umpqua Chatters," how management found out about McCool's post, how they responded, etc., there is really no clear factual inference to draw. Given this dearth of information which no witness failed to cure, however, McCool has not been adequately established as a comparative employee.

due to the combination of smoke and heat. His affirmation of these complaints in the September 6 meeting was likewise protected and separates him from the alleged comparative employees the Respondent puts forth.

The Respondent points to supervisor Parker, who was suspended for telling an employee who had raised a concern about hitting his head on a bolt beneath a beltway to "duck next time." I do not find the roles of N. Miller and the front-line supervisor to be comparable. Moreover, their situations are divergent, in that the supervisor who made the snide comment had been asked by a subordinate employee to address a safety concern. Here, the individuals in charge of decision making were the target of N. Miller's complaint over what he perceived as a management decision negatively impacting employee safety.

As detailed above, I have found that N. Miller's actions in the September 6 meeting were and remained protected. Though the Respondent contends that N. Miller's behavior at the meeting was only one reason for his termination, it is clear that absent that meeting, and the report Ramm received about N. Miller's behavior during it, the Respondent was not in the process of terminating N. Miller's employment. The interaction at that meeting was the catalyst for the suspension and the termination. Put more simply, erase the meeting and, absent some other intervening event, N. Miller would still be employed. *Structural Composites Industries*, supra.

Based on the foregoing, assuming a *Wright Line* analysis applies, I find the General Counsel has met her burden to prove N. Miller was suspended and terminated in violation of Section 8(a)(3) and (1) as alleged.

CONCLUSIONS OF LAW

By suspending and terminating employee Nicholas Miller, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily suspended and discharged Nicholas Miller, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum

backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 358 NLRB 823 (2012), reaffd. 361 NLRB 1171 (2014); *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate Nicholas Miller for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 19 a report allocating backpay to the appropriate calendar year for Nicholas Miller. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner

The Respondent shall also be required to remove from its files any references to the unlawful suspension and discharge of Nicholas Miller and to notify him in writing that this has been done and that the suspension and termination will not be used against him in any way.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2017. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 19 of the Board what action it will take with respect to this decision.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Roseburg Forest Products Co., Riddle, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Suspending, discharging, or otherwise discriminating against any employee for engaging in union or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Nicholas Miller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Nicholas Miller whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, including search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.

(c) Compensate Nicholas Miller for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to his unlawful suspension and discharge, and within 3 days thereafter, notify Nicholas Miller in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Riddle, Oregon facility copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2018

Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss safety issues and work-related complaints with other employees, including by doing so on the Carpenters Industrial Council Union Facebook page, and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT suspend or fire you because you exercise your right to discuss safety issues and work-related complaints verbally with other with other employees and supervisors or on the Carpenters Industrial Council Union Facebook page.

WE WILL offer Nicholas Miller immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Nicholas Miller for the wages and other benefits he lost, including search for work expenses, because we suspended and fired him.

WE WILL remove from our files all references to the suspension and discharge of Nicholas Miller and WE WILL notify him in writing that this has been done and that his suspension and discharge will not be used against him in any way.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/19-CA-213306 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (206) 220-6284.